

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SHIVAM ENTERPRISES of NY, INC.</b>	:	<b>ORDER</b>
	:	<b>DTA NO. 822351</b>
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Period September 1, 2003	:	
through August 31, 2006.	:	
	:	

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Petitioner, Shivam Enterprises of NY, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2003 through August 31, 2006.

On June 30, 2008, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) upon the basis that the petition had not been filed with the Division of Tax Appeals within the applicable period of time prescribed by statute. On July 29, 2008, petitioner, appearing by Jagdish Kakwani, submitted a letter in response challenging the proposed dismissal of the petition. On July 30, 2008, the Division of Taxation by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted the affidavit of John E. Matthews, Esq., together with exhibits attached in support of the proposed dismissal of the petition. The parties had 30 days from the June 30, 2008 date of the Notice of Intent to Dismiss Petition to respond thereto, and thus the 90-day period for issuance of this determination commenced on July 30, 2008. After due consideration of the documents and arguments presented, Dennis M. Galliher, Administrative Law Judge, renders the following order.

***ISSUE***

Whether petitioner timely filed a petition with the Division of Tax Appeals.

***FINDINGS OF FACT***

1. On December 20, 2006, the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division) received from petitioner, Shivam Enterprises of NY, Inc., a Request for Conciliation Conference (Request). Petitioner's Request challenged the Division's Notice of Determination (Assessment No. L-027796506) dated October 23, 2006, assessing sales and use taxes due for the period September 1, 2003 through August 31, 2006 in the amount of \$190,713.34, plus penalty and interest.

2. A conciliation conference was conducted on November 7, 2007, and by a Conciliation Order (CMS No. 217027) dated March 21, 2008, BCMS advised petitioner that its Request was denied and the statutory notice was sustained.

3. Petitioner responded to the Conciliation Order by filing a petition with the Division of Tax Appeals. The petition, signed by Jagdish Kakwani on behalf of petitioner and hand-dated June 16, 2008, challenges the tax, penalty and interest assessed as due pursuant to Assessment No. L-027796506 and sustained by the Conciliation Order. The envelope in which the petition was mailed by certified mail, return receipt requested, is addressed as follows:

Supervising Administrative Law Judge  
NYS Division of Tax Appeals  
Riverfront Professional Tower  
500 Federal Street  
Troy, N.Y. 12180-2894

The envelope bears the June 21, 2008 postmark of the Carle Place, New York (zip code 11514) branch of the United States Postal Service (USPS). The envelope, as well as all pages of the petition, bears the receipt stamp of the Division of Tax Appeals dated June 23, 2008.

4. On June 30, 2008, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. This Notice advised that the Conciliation Order appeared to have been issued on March 21, 2008, but that the petition was not mailed until June 21, 2008, or 92 days thereafter. As a consequence, the petition was not timely filed, thus leaving the Division of Tax Appeals without jurisdiction to address the merits of the petition. The Notice further advised that the parties had 30 days from the date of the Notice within which to submit written comments on the proposed dismissal of the petition.

5. By a letter dated July 29, 2008, petitioner challenged the proposed dismissal of the petition. Petitioner alleged that the petition in this matter was filed by facsimile on June 16, 2008, that a copy of the petition was mailed by regular mail on June 16, 2008, and that a copy of the petition was mailed by certified mail on June 21, 2008. There is no evidence in the record showing receipt of the alleged transmission of the petition by facsimile, or mailing or receipt of the petition allegedly filed by regular mail.

6. By a letter dated July 30, 2008, the Division also responded to the proposed dismissal of the petition. The Division takes the position that since the Conciliation Order was mailed on March 21, 2008 but the petition was not filed until June 21, 2008, the petition was therefore not filed within the requisite 90 days from the date of issuance of the Conciliation Order and must be dismissed as not timely filed. In support of its position, the Division submitted the certified mailing record (CMR), relevant documents and supporting affidavits authenticating the same and detailing the standard procedure pursuant to which conciliation orders are mailed. These documents also identified the subject Conciliation Order and provided evidence to establish that such Order, together with its covering letter enclosed within an envelope, was in fact mailed to petitioner at its last known address, 355 Glen Cove Avenue, Carle Place, New York 11514, by

certified mail when it was delivered into the custody of the USPS with the appropriate amount of postage and fees affixed on March 21, 2008, in accordance with the standard procedure as detailed in the documents submitted.<sup>1</sup>

7. Petitioner has raised no challenge to the Division's claim that the subject Conciliation Order was properly issued on March 21, 2008, nor has petitioner denied receipt of the Order thereafter. Careful review of the CMR, attendant documents and supporting affidavits bears out that the Order was, in fact, properly mailed by certified mail to petitioner at its last known address on March 21, 2008. Instead, petitioner's claim is that the petition was mailed by regular mail on June 16, 2008 and was transmitted by facsimile on the same date, and thus was timely filed.

### ***CONCLUSIONS OF LAW***

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 1138(a)(1), the Conciliation Order in this case and the underlying tax assessment would be binding upon petitioner unless a timely petition was filed with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

B. Where the timeliness of a taxpayer's petition following a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly

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<sup>1</sup> The Division's evidence also establishes that a copy of the Conciliation Order was mailed by certified mail on the same date and in the same manner to petitioner's then-representative, Khozem Master, CPA, Master Tax and Business Services, 32 Haverford Road, Hicksville, NY 11801.

mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to a petitioner's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). Here, the Division's response in support of the proposed dismissal on the basis that the petition was not timely filed included documentary evidence which established that the Conciliation Order in this case was properly mailed to petitioner, and to petitioner's then-representative, on March 21, 2008 (*see* Finding of Fact 6; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Petitioner has not challenged the propriety of the issuance of the Conciliation Order, or of its receipt, but rather maintains that the petition was properly mailed within the 90-day jurisdictional limit for filing a petition. As noted, petitioner bears the burden of proving timely and proper mailing (*Matter of Malpica*).

C. A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989), and it is properly mailed when it is delivered into the custody of the USPS, as detailed above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the conciliation order was properly mailed to petitioner when it was delivered into the custody of the USPS on March 21, 2008, as described, and it is this date which commenced the 90-day period within which a petition had to have been filed in order to be considered timely.

D. The ninetieth day after March 21, 2008 was Thursday, June 19, 2008. Petitioner claims that the petition was mailed by ordinary mail on June 16, 2008, and thus was mailed within such

90-day period. Petitioner also claims to have transmitted a copy of the petition via facsimile on June 16, 2008, and apparently claims that the same constitutes proper and timely filing. As to petitioner's allegation of having mailed the petition by ordinary mail on June 16, 2008, the well-established rule is that where a taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the USPS or that the document may not be delivered at all (*see Matter of Sipam Corporation*, Tax Appeals Tribunal, March 10, 1988). Furthermore, the mere allegation of a timely filing without a postal receipt for certified or registered mail is "insufficient, as a matter of law, to prove timely filing" (*Matter of Dattilo*, Tax Appeals Tribunal, May 11, 1995, *confirmed* 222 AD2d 28 [1996]). The record contains no evidence of petitioner's claimed mailing of the petition on June 16, 2008, or of receipt thereafter by the Division of Tax Appeals. Thus, petitioner's allegation of such mailing succumbs to the risk of nondelivery. As to petitioner's claim of having transmitted a copy of the petition via facsimile on June 16, 2008 there is no evidence, such as a facsimile transmission receipt, to support such claim. Moreover, the Tax Appeals Tribunal has pointed out that there are no provisions in the Tribunal's regulations for filing by means of facsimile transmission, and has not even "implicitly authorized" the filing of jurisdictional documents by facsimile service (*Matter of Rubo Sales Corp.*, Tax Appeals Tribunal, February 25, 1993). The earliest (and only) evidence of the filing of a petition is the petition filed by certified mail on June 21, 2008. Unfortunately, this June 21, 2008 date falls beyond the requisite 90-day period within which a petition must be filed, and hence was not a timely filed challenge to the conciliation order.

E. This determination, made pursuant to the Notice of Intent to Dismiss Petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the Division on a motion for summary determination for failure to have timely filed a petition, and

precludes petitioner from having a hearing on the substantive issued of the assessment. As provided in 210 NYCRR 3000.9(b)(1) addressing motions for summary determination, such a motion “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented.” Petitioner has offered no evidence to counter the Division’s motion regarding the issue of the timeliness of petitioner’s protest, and petitioner is therefore deemed to have conceded that no question of fact requiring a hearing on such issue exists (*see Kuehne & Nagel v. Baden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Accordingly, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor. Since a petition was not timely filed as required by statute, there is no jurisdiction to proceed with this matter (Tax Law § 170[3-a][e]; § 1138[a][1]; 20 NYCRR 4000.5[c][4]).

F. The petition of Shivam Enterprises of NY, Inc. is hereby dismissed.

DATED: Troy, New York  
October 28, 2008

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE